service, the network will very likely be unable to meet the subscription levels which are the entire basis for its affiliation with the cable operator. A removed, repositioned, or retiered basic cable network will face the same or similar consequences from the loss of subscription levels and in addition will very likely be unable to meet the viewership levels it has guaranteed to advertisers, thus subjecting itself to refund and make-good obligations. Basic and pay cable networks will, however, have already agreed to pay license fees to program suppliers in anticipation of meeting those very same subscription and/or viewership levels. Thus, assuming that either a pay cable or basic cable network is unable to terminate or modify its existing contracts with program suppliers, abrogation of affiliation agreements will have a further significant economic effect: aside from losing revenue, the network may be unable to pay program license fees which assume a minimum level of revenue premised on the existence of the very affiliation agreements that are being abrogated.

The fourth Nachman factor also weighs against preemption, since there is nothing in the Act which would mitigate any abrogation of existing affiliation contracts. For instance, the Act does not limit the time period during which retroactivity will apply, does not specify remedies available to a cable network once its affiliation contract has been abrogated, and does not provide that the network will be entitled to carriage on a substitute channel or tier in the event of abrogation. The Act

also does not insulate a cable network from liability in the event it cannot meet its obligations to program suppliers and, for basic cable networks, to advertisers in the event of abrogation.

Finally, Viacom submits that the practical problems associated with abrogating existing affiliation contracts militate in favor of non-preemption. If, for example, an affiliation agreement is abrogated and a cable network is removed from a cable system, extensive litigation could ensue over the relative rights of cable networks on the system and whether the contractual rights of some cable networks give them greater rights to continued carriage than the contractual rights of other cable networks. Similarly, if abrogation of an affiliation agreement results in the relocation of a basic network to another channel on the basic tier or to an intermediate tier, the cable operator will in all likelihood select a channel occupied by an entity that does not have statutory carriage or channel positioning rights, i.e., another cable network. Other cable networks, however, will likely have contractual carriage rights similar to those of the cable network whose affiliation contract was abrogated, creating a further potential morass of litigation over which network's contractual rights would predominate and over how many affiliation contracts a cable operator may abrogate in order to accommodate the varying carriage and channel rights of cable networks and still comply with its statutory must-carry obligations. In addition, there would likely be a substantial

amount of litigation over contracts which cable networks may be unable to honor or the obligations which cable networks may be unable to meet once the network's affiliation contract and the economic benefits of the contract are abrogated. There is also a possibility of litigation between a franchising authority and the cable operator if any service required in a franchise agreement is dropped.

In sum, Viacom recognizes that the constitutionality of the Act's must-carry provisions is presently being fought in court. Viacom submits, however, that any FCC rules implementing the Act's must-carry provisions must recognize the rights bargained for by cable networks prior to passage of the Act and must recognize that abrogation of those rights necessarily implicates not only due process issues pertaining to the economic relationships involving cable networks, cable operators, advertisers, program suppliers, and others, but also the First Amendment rights of cable operators to select and package their programming. In view of Congress' removal of preemption language from earlier versions of the Act, its general disposition throughout the Act against overriding existing contracts, general principles of statutory construction, the constitutional requirements imposed on retroactive economic legislation generally, and the very substantial practical problems associated with abrogation, Viacom submits that the FCC will only raise further questions about the constitutionality of the Act's must-carry provisions if in adopting must-carry rules it authorizes

cable operators to abrogate their existing affiliation contracts. Viacom therefore urges that the FCC declare that when must-carry rights conflict with a cable operator's obligations under its existing affiliation contracts with cable networks, must-carry requirements cannot be applied until the expiration of those contracts.

III. RETRANSMISSION CONSENT.

A. The FCC's Proposed Implementation of the Act's Retransmission Consent Provisions Will Produce Incongruous Results Not Intended by Congress.

Under Section 325(b)(3)(B) of the Act, local commercial television stations must elect -- by October 6, 1993, and every three years thereafter -- between the must-carry provisions of Section 614 or voluntary carriage pursuant to retransmission consent agreements with cable systems. 47 U.S.C. Section 325 (b)(3)(B). However, Viacom submits that the Act is ambiguous about whether a cable system may carry distant stations (i.e., stations (other than superstations) that are located outside the ADI in which a cable system operates) without retransmission consent. Section 325 also does not address whether a local station which elects retransmission consent but is not carried may nonetheless exercise its program exclusivity rights and thereby prevent the cable operator from importing identical programming via a distant signal. Finally, it is unclear exactly what Congress intended when it stated in Section 325(b)(3)(B) that a local station's election between must-carry and

retransmission consent shall apply to all cable systems serving the "same geographic area."

Viacom respectfully submits that in the NPRM the FCC has interpreted each of these issues in a way that will produce incongruous results entirely at odds with Congress' basic intent in amending Section 325. Specifically, the FCC (i) expressly states that distant stations are entitled to exercise retransmission consent rights; (ii) does not propose to amend its rules to prohibit a local station requesting retransmission consent (a "consent station") which is not carried by a cable system from exercising program exclusivity rights against carriage of substitute programming on a distant signal by that system; and (iii) interprets the phrase "same geographic area" to mean that a local station's must-carry/retransmission consent election will apply only to cable systems whose service areas "directly overlap" one another. The combined effect of these interpretations produces results that raise serious questions as to whether the FCC correctly divined Congressional intent. To illustrate, consider the following scenario:

> --Two cable systems serve the same ADI but their service areas do not directly overlap. A local network affiliate elects must-carry on one system and retransmission consent on the other.
>
> --The local network affiliate is not carried by the system on which it has elected retransmission consent. To provide substitute programming to its subscribers, the cable operator attempts to import the signal of a distant station affiliated with the same network.
>
> --Despite the fact that the cable compulsory license expressly allows the cable operator to import the

distant network affiliate's programming, the cable operator cannot do so without the distant affiliate's retransmission consent.

--The distant affiliate will not or cannot grant the cable operator retransmission consent. Alternatively, the distant affiliate grants retransmission consent but the uncarried local affiliate exercises its network non-duplication and/or syndicated exclusivity ("syndex") rights, thereby requiring the cable operator to "black out" the distant affiliate's network programming, as well as some syndicated programming.

These events will create a situation where cable subscribers will receive the network's programming as before in some areas of an ADI (i.e., those served by the cable system on which the local affiliate elected must-carry) but cable subscribers will not receive the network's programming at all in other areas of the ADI (i.e., those served by the system on which the station has elected retransmission consent but agreement to the terms of that consent has not been reached between the station and the cable system). Viacom submits that Congress did not intend that the Act's retransmission consent provisions and the FCC's program exclusivity requirements permit a local network affiliate to selectively deny its network's programming to cable subscribers in the ADI until its retransmission consent demands are met. For the reasons set forth below, Viacom urges that both the language and the legislative history of the Act compel a different, more reasonable result.

1. Cable Systems May Carry Distant Signals Without Obtaining Retransmission Consent.

The 1992 Act adds a new subsection (b) to Section 325 of the Communications Act of 1934, which in subsection (b)(1)

permits a station to prohibit cable system carriage unless the cable system has obtained retransmission consent from the station. Section 325(b)(1) provides in relevant part that:

> [N]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except -
>
> (A) with the express authority of the originating station; or
>
> (B) pursuant to section 614, in the case of a station electing, . . ., to assert the right to carriage under such section.

Neither Section 325(b)(1) nor Section 325(b)(1)(A) explicitly limits the applicability of retransmission consent to local signals. Accordingly, if there were no other provisions in Section 325(b), it would appear that, except for local stations electing must-carry pursuant to Section 614 and superstations (which in Section 325(b)(2)(D) are the subject of an explicit exemption from retransmission consent), cable systems could not carry any television signals, local or distant, without obtaining retransmission consent. In fact, that is the way the FCC in the NPRM has interpreted Section 325(b).[11/] However, as shown below, when Sections 325(b)(1) and 325(b)(1)(A) are read with the remaining provisions of Section 325(b), Section 614 of the Act

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[11/] Specifically, the FCC states that, "Out-of-market retransmission of a commercial television station's signal will occur only pursuant to a retransmission consent agreement." NPRM at ¶ 45. See also NPRM at ¶ 61 ("[H]ow will retransmission consent affect the carriage of signals that are distant with respect to a particular cable system but are not superstations? Such stations can only be carried pursuant to a retransmission consent agreement.") (footnote omitted).

and the legislative history of the Act, it is clear that Congress did not intend retransmission consent to be applicable to distant signals.

Section 325(b)(3)(A) requires the FCC to commence a rulemaking proceeding to establish regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under Section 325(b) and the exercise of their must-carry rights under Section 614. Section 325(b)(3)(B) then more specifically requires, in relevant part, as follows:

> The regulations required by subparagraph(A) shall require that television stations, . . ., make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under Section 614. (Emphasis supplied.)

But the only stations that have the statutorily created right to make an election for signal carriage under Section 614 are local stations - i.e., stations "within the same television market as the cable system" (Section 614(h)(1)(A)). Section 325(b)(3)(B) does not say that the FCC's regulations may provide that only some stations are subject to the election requirement and that other stations to which the election requirement does not apply (i.e. , distant signals) need not make any election at all. Instead, the language of Section 325(b)(3)(B) is mandatory - the regulations which are required by the Act shall in turn require an election. There is no provision in the Act for any regulations which can apply in those situations where an election is not made. Since distant stations are thus statutorily

incapable of making an election under Section 614, the retransmission consent requirement cannot be applied to them.

If, notwithstanding the explicit language of Section 325(b)(3)(B), the FCC were to adopt regulations that require retransmission consent for carriage of distant signals, the FCC would have to demonstrate that distant signal retransmission consent was meant to operate separately and apart from the must-carry/retransmission consent election. It cannot do so because there is nothing in either the Act or its legislative history that provides a basis for ignoring the plain meaning of the election requirement set forth in Section 325(b)(3)(B).

The only apparent statutory arguments for interpreting retransmission consent as applying to distant signals are (i) that the terms "broadcasting station" in Section 325(b)(1) and "originating station" in Section 325(b)(1)(A) are different from the terms "television broadcast stations" in Section 325(b)(3)(A) and "television stations" in Section 325(b)(3)(B), thus permitting the former set of terms to include distant signals even though the latter set does not; (ii) that the language in Section 614(a), stating that carriage of "additional broadcast signals" beyond those whose carriage is required under Section 614 is "subject to Section 325(b)," evidences Congressional intent to subject distant signals to the retransmission consent requirement; and (iii) that because one type of distant signal -- a superstation signal -- is specifically exempted from retransmission consent by Section 325(b)(2)(D), Congress intended

to subject other distant signals to the retransmission consent requirement.

For the first of these arguments to succeed, the FCC would have to establish that the terms "broadcasting station" as used in Section 325(b)(1) and/or "originating station" as used in Section 325(b)(1)(A) include distant signals, even though it is clear from their context that the terms "television broadcast stations" as used in Section 325(b)(3)(A) and "television stations" as used in Section 325(b)(3)(B) do not. The FCC has already acknowledged Congress' definitional imprecision in Section 325(b) by seeking comment on whether to apply the Act's retransmission consent provisions to radio signals as well as television signals.[12/] NPRM at ¶ 43 and n.56. Notwithstanding that imprecision, it is clear that there is no basis for according any significance to the use by Congress of slightly different terms throughout the provisions of Section 325(b). In any event, most of the imprecision can be eliminated by closely examining how Congress used specific terms in Section 325(b). The term "television broadcast stations" in Section 325(b)(3)(A) and "television stations" in Section 325(b)(3)(B) clearly mean only local stations because, as discussed above, those terms refer to stations that must make a must-carry/retransmission

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[12/] Viacom believes that it is clear from the language of Section 325(b)(3)(A) referring to "television broadcast stations," and the language of Section 325(b)(3)(B) referring to "television stations," that Congress did not intend retransmission consent to be applicable to radio signals.

consent election under rules to be adopted by the FCC in this proceeding, and only local stations can make such an election. Similarly, the term "originating television station" as used in Section 325(b)(4) can also only mean a local station, since Section 325(b)(4) also refers to a station that makes an election under Section 325(b)(3)(B), which again can only be made by a local station.

If Congress had intended its retransmission consent requirement to apply to distant television signals, it is inconceivable that, in the implementing portions of Section 325(b) where it is giving the FCC explicit instructions concerning the content of the rules it must adopt, it would use the terms "television broadcast stations" and "television stations" in a context where they can only be applied to the local signals which must elect between must-carry and retransmission consent. It is similarly inconceivable that radio signals would not have been mentioned in Sections 325(b)(3)(A) or (B) if the terms "broadcast station" and "originating station" as used in Sections 325(a) and (a)(1) were intended to include any type of broadcasting signals other than television signals. The terms "broadcast stations" in Section 325(b)(1) and "originating station" in Section 325(b)(1)(A) thus cannot, in the absence of some other indication in the Act or its legislative history, be interpreted as meaning anything other than "television broadcasting station" and "originating television station." Since, as discussed above, "television broadcast station," as

used in Section 325(b)(3)(A), and "originating television station, " as used in Section 325(b)(4), clearly refer to local stations, there is simply no basis for using unexplained minor differences in terminology as a predicate for applying the retransmission consent requirement to distant signals.

The second argument would read Section 614(a) as permitting the carriage of all television signals, other than must-carry signals and superstations, only with retransmission consent. There is, however, no basis in the Act or its legislative history for so interpreting Section 614(a). After providing for must-carry rights as specified in the balance of Section 614, Section 614(a) states in relevant part that "Carriage of additional television broadcast signals . . . shall be at the discretion of [the cable] operator, subject to Section 325(b)." There are several problems with reading this language as requiring retransmission consent for the carriage of distant signals. First, making carriage of additional signals "subject to" Section 325(b) doesn't change the substantive requirements of that Section. If the substantive provisions of Section 325(b) do not require retransmission consent for carriage of distant signals, then a cross-reference to Section 325(b), particularly when that cross-reference does not even mention distant signals, cannot add requirements to Section 325(b) that are not already there. Second, the subject matter of Section 614, as indicated by its title, is "Carriage of Local Commercial Television Signals," and Section 614(a) is entitled "Carriage Obligations,"

which exist only for local signals. It is difficult to see how this language, specifying what Congress intended to cover in Section 614 and Section 614(a), can be ignored in determining the scope of Section 614(a). Finally, the FCC has itself already tentatively concluded that, even though some provisions of Section 614 when read literally could be interpreted as applying to all television signals,[13/] "in fact [they] apply only to must-carry stations." NPRM at ¶ 56.

The third argument would be that, since Congress in Section 325(b)(2)(D) expressly exempted superstations from retransmission consent requirements, its failure to also exempt other distant signals signifies an intention to require retransmission consent for carriage of all distant signals other than those of superstations. However, there are other reasons why superstations are specifically exempted from retransmission consent while other distant signals are not. First, if, as Viacom has shown, Section 325(b) does not apply to distant signals at all, there is no need for a specific exemption for distant signals. Second, the specific exemption for superstations is one of several provisions in the Act making specific provisions for programming delivered by satellite technology; indeed, three of the four exemptions in Section 325(b)(2) share a common element of relating to satellite

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[13/] See, e.g., Section 614(b)(3)(B) ("The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system . . . .").

delivery.[14/] Similarily, in Section 623(b)(7)(A)(iii) (47 U.S.C. Section 543(b)(7)(A)(iii)), superstations are exempted from the requirement that all broadcast signals be carried on the basic service tier, thus according cable operators the same discretion that they have with other satellite-delivered programming to package the satellite-delivered signals of superstations in separate tiers. In Section 628 (47 U.S.C. Section 547), satellite cable programming vendors in which a cable operator has an attributable interest and satellite broadcast programming vendors are prohibited from engaging in various unfair methods of competition or deceptive acts or practices. In Section 335 (47 U.S.C. Section 335), various regulatory requirements such as compliance with the political broadcasting laws and provision of channel capacity for non-commercial programming by providers of direct broadcast satellite service are imposed.

The Act thus makes specific provision, in a variety of ways, for satellite-delivered programming that has significantly greater audience reach than distant signals received off-the-air or delivered by terrestrial microwave. The specific exemption of superstations in Section 325(b)(2)(D) from the retransmission consent requirements of the 1992 Act is thus consistent with the Act's specific treatment of satellite-delivered program services

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[14/] The fourth exemption is for noncommercial stations, which themselves are accorded special treatment under Section 615 of the Act.

in a variety of situations, and cannot, without some more explicit legislative direction, be read as signifying Congressional intent to exempt only superstations, but not other distant signals, from the Act's retransmission consent requirements. A contrary interpretation would in any event raise serious constitutional issues because carriage of superstations would then be accorded a preferential position over carriage of other distant television signals received off-the-air or by terrestrial microwave. See, e.g., Police Department of Chicago v. Mosley, supra.

The foregoing statutory analysis is confirmed in the legislative history of the Act. The Act's retransmission consent provisions are taken from the Senate version of the Act, entitled the Cable Television Consumer Protection Act of 1991, or S.12 (referred to herein as the "Senate Bill"). In its Report on the Senate Bill, the Senate Committee, in a section describing the purpose of the Senate Bill, stated that "[T]he bill . . . gives local broadcasters the right to require cable operators to obtain their consent to retransmit their signals." Senate Report at 1-2 (emphasis added). The Senate Committee further stated:

> S.12 includes a provision that gives broadcasters retransmission consent rights . . . . One year after enactment, every broadcaster will have to elect whether it wants to avail itself of must-carry or assert its retransmission rights.

Id. at 63. The language demonstrates that the Senate Committee expressly tied must-carry rights to retransmission consent

rights, as does the Act, and did not contemplate that retransmission consent rights could be exercised in the absence of must-carry rights.

During the floor debate on the House version of the Act (H.R. 4850), several remarks were made suggesting that the House considered retransmission consent rights to be available only to local stations. Specifically, House members debated the Eckart-Fields amendment, which would have added retransmission consent provisions to the House bill similar to those in S.12. That amendment was approved by the House Subcommittee on Telecommunications and Finance before being removed at the full committee level for jurisdictional reasons. 138 Cong. Rec. H6490 (1992). In the House debate on the amendment, Representative Callahan stated:

> This right of retransmission consent, which the Eckart-Fields amendment would provide, is a local right. . . . Networks are not a party to these negotiations, except in those few instances where they own local stations themselves.

Id. at H6491 (1992) (emphasis added). Similarly, Representative Chandler stated:

> [R]etransmission consent is a local issue . . . . It is an issue of local stations, carrying local programming and news about local interests.

Id. at H6493 (emphasis added).

Finally, both the House and Senate debates on the Conference Report on the Act reflect that Congress believed that

retransmission consent is a purely local right. For instance, on September 17, 1992, Representative Harris stated:

> [Retransmission consent] gives local, and I emphasize, local broadcasters the right to negotiate in good faith for their sole product - their broadcast signal.

138 Cong. Rec. H8676 (1992) (emphasis added). During the Senate debate, Senator Bradley stated that "[t]he bill's retransmission consent provision allows a broadcaster . . . to negotiate terms for the use of [its] signal or take advantage of must-carry rules . . . . I believe that most broadcasters will opt for must-carry while a significant number of other broadcasters will negotiate nonmonetary terms. . . . Whatever terms are negotiated will only last for [three] years." 138 Cong. Rec. S14603 (1992) (emphasis added).

Moreover, the legislative history of the Act reflects that Congress adopted the Act's retransmission consent provisions to remedy what it perceived to be a competitive imbalance between cable systems and local television broadcasters. In its Report on the Senate Bill, the Senate Committee stated that:

> The Committee has concluded that the exception to section 325 for cable retransmissions has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. . . [The Committee] does not believe that public policy supports a system

> under which broadcasters in effect subsidize the establishment of their chief competitors.

Senate Report at 35.[15/] In contrast, cable operators do not generally compete with distant stations for advertising dollars, since advertisers usually do not pay a television station for cable viewership in distant markets.[16/] Hence, the economic basis for retransmission consent, as postulated by Congress, is entirely inapplicable to distant stations and therefore cannot justify allowing distant stations to exercise retransmission consent rights.

Further, requiring a cable operator to obtain a distant network affiliate's retransmission consent when a local affiliate will not grant such consent gives entirely too much bargaining power to the local affiliate during retransmission consent negotiations. Since local network affiliates account for a substantial share of cable viewing, both by virtue of their network programming and their local news and public affairs programming, the FCC can expect that local network affiliates will enjoy considerable bargaining power under the Act's must-carry/retransmission consent scheme. Viacom submits that the

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[15/] See also, e.g., the remarks of Senator Adams during the floor debate on the Senate Bill ("[t]he retransmission consent provisions of S.12 require more equity in the business relationship between local TV broadcasters and the cable companies."). 138 Cong. Rec. S591 (1992).

[16/] See In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules, 3 FCC Rcd 5299, 5306 (1988) ("Syndex Order") ("Generally, local advertisers will pay little or nothing for the audiences that view them on cable in distant markets. . . .").

cable operator's only real bargaining chip in retransmission consent negotiations with the local affiliate is the possibility that the cable operator will import a distant affiliate or other distant signal programming under the compulsory license to replace any lost programming . Once the cable operator loses this option, it will have little choice but to deal with the local affiliate entirely on the affiliate's terms.[17/] The FCC should not adopt rules producing such a result unless it has no choice under the statutory provisions adopted by Congress. Here, the statute not only does not compel that result but, properly construed, requires the opposite result -- that cable operators continue to be able to carry distant signals, subject only to the copyright compulsory license and not to retransmission consent.

2. The FCC's Exclusivity Rules Should Not be Applicable to Retransmission Consent Stations Not Carried by Local Cable Systems.

In the above scenario, the local station's bargaining power, and particularly that of network affiliates, will be especially pronounced if the FCC also allows the local station, if it is unable to consummate a retransmission consent agreement with a cable system, to exercise network non-duplication or syndex

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[17/] The FCC must not underestimate the likelihood that the networks will not allow their affiliates to grant retransmission consent in distant markets. Viacom understands that Fox's affiliation agreements now require the affiliate to consult with Fox and come to an understanding about whether to opt for retransmission consent, and if so, on what terms. Viacom also understands that Fox affiliation agreements provide that any failure by the affiliate to comply with these terms could render the affiliation null and void.

rights against distant stations. That would result in the local station having absolute veto power over whether cable subscribers can view the programming carried by the local station if the cable system does not accede to the local station's retransmission consent demands.[18/] This effect would be particularly severe if the local station involved is a network affiliate, both because of the amount of programming involved and because network programming continues to be the most watched programming provided by cable systems. The result, if permitted, would be that the program exclusivity rules, intended to protect property rights without depriving viewers of programming, would at least for network affiliates and to a lesser degree for all stations, become the ultimate weapon in retransmission consent negotiations.

The program exclusivity rules were not adopted for the purpose of providing a bludgeon to broadcast stations for use in their negotiations with cable operators by threatening to deny programming to consumers served by those cable systems unable to arrive at retransmission consent agreements with broadcasters. Instead, the FCC sought in its program exclusivity rules to encourage the development of diverse program fare by permitting exploitation of the value of programs and to eliminate unfairness

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[18/] With respect to network stations, such a result would be at odds with the Act's legislative history, which suggests that the signals of the three largest broadcast networks will be available to all cable subscribers. See, e.g., Remarks of Senator Inouye, 138 Cong. Rec. S561 (1992) ("The basic tier is generally made up of those programs that many get for free: ABC, NBC, CBS.").

to broadcasters. Syndex Order at 5308-5313. Elimination of syndex and network non-duplication rights for consent stations that are not carried will neither impede the development of diverse program fare nor result in unfairness to broadcasters. Denying program exclusivity to uncarried consent stations will not adversely affect the first exclusivity objective of encouraging development of diverse program fare. Network expenditures on programming are dependent upon the advertising revenues their programs generate. Because most cable systems that are unable to agree with local network affiliates on the terms and conditions of retransmission consent will bring in the signals of distant network affiliates, network audiences, and therefore network advertising rates, will be maintained.[19/] Syndicators will also continue to be compensated for the programs they license to stations because retransmission consent fees will enable stations to continue to pay syndicators based on the value of the syndicated programs in the local market.[20/] In addition,

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[19/] This assumes that the FCC agrees with Viacom that carriage of distant signals is not subject to the retransmission consent requirement. Even if the FCC were to determine that retransmission consent is applicable to distant signals, networks would still have it within their power to maintain revenues through a combination of authorizing affiliates to grant retransmission consent for network programs, providing direct feeds of network programs to cable systems otherwise unable to obtain those programs, or recouping any reduced advertising revenues by requiring in their affiliation agreements that affiliates electing retransmission consent share their retransmission consent fees with the network.

[20/] If any consent station is not able to pay the local market value of syndicated programming from its advertising and

(continued...)

syndicators[21/] will obtain additional revenues from copyright compulsory license fees if programs licensed to an uncarried consent station are carried in the local market by cable systems importing distant signals.

The second exclusivity objective of assuring fairness to broadcasters will also not be compromised by denying exclusivity on cable systems to uncarried consent stations since, as explained below, even these uncarried stations realized during the retransmission consent negotiation process the value of their exclusive program rights, despite the fact that the negotiation may have been unsuccessful. When in the Syndex Order the network non-duplication rules were last revised and syndex restored, cable systems had no must-carry obligations and paid no copyright fees for carriage of local signals. The FCC therefore concluded that the exclusivity rules it adopted in the Syndex Order were required for stations to fully exploit the value of their programs in the local market. With retransmission consent, stations can still obtain the full value of their programs, but they have more options on how to do so. First, they can elect

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[20/](...continued)
retransmission consent revenues, it is likely that at the next election period the station will reevaluate whether it should again elect retransmission consent over must-carry.

[21/] The Copyright Royalty Tribunal distributes royalties to syndicators of the retransmitted programming; however, depending upon the terms of the applicable contract, the syndicator may be required to share, or to remit, all of these royalties to another party. National Broadcasting Co. v. Copyright Royalty Tribunal, 848 F.2d 1289 (D.C. Cir. 1988).

must-carry and be assured of continuing the same program exclusivity they currently receive.[22/] Second, stations electing retransmission consent and establishing reasonable terms and conditions for retransmission consent will gain, because their exclusivity rights will continue and they will also have the opportunity to obtain additional retransmission consent revenues. Third, stations electing retransmission consent that are unable to reach agreements with cable operators have nevertheless realized the value of the programming in the bargaining process, since the attractiveness of their program schedules was precisely the substantive matter around which the negotiations revolved. If the station is unsuccessful in those negotiations, it would only be because the station made a marketplace judgment that it thought it could increase its revenues by electing retransmission consent. It is not the role of government to protect stations from the effect of marketplace judgments that turn out to be wrong. Furthermore, according syndex and non-duplication protection to uncarried consent stations would also introduce unwarranted distortions into the negotiating process. In any event, if the station's judgment does prove to have been wrong, it can make a different judgment at the next election period or remedy the situation by modifying the terms and conditions upon which it is willing to grant retransmission consent.

[22/] Local stations that are not currently carried will gain an additional benefit by having carriage rights on cable systems.

Viacom acknowledges that the Senate Committee, in its Report on the Senate Bill, stated that amendments or deletions to the FCC's network non-duplication and syndex rules "in a manner" that would allow distant stations to be substituted on cable systems for local stations carrying the same programming "would . . . .be inconsistent with the regulatory structure created in S.12." Senate Report at 38. While this language is one indication of Congressional intent, it is not in the Act and was not discussed on the floor of either the House or the Senate. The FCC has independent responsibility to determine what requirements not mandated by the Act are inconsistent with the overall regulatory structure of the entire Act and its legislative purpose.

Denial of program exclusivity for uncarried consent stations will better effectuate the overall purposes of the Act than permitting them to exercise program exclusivity under the current FCC rules. As demonstrated above, denial of exclusivity for uncarried consent stations will not adversely affect the development of diverse programming or result in unfairness to broadcasters. On the other hand, exercise of exclusivity rights will have adverse consequences that Viacom does not believe were contemplated by Congress. Cable systems deprived of other options for obtaining programming their subscribers want will be subjected to such an unequal bargaining situation that, as a practical matter, they will be forced in many instances to pay whatever the broadcaster demands. This, Viacom submits, will convert the must-carry/retransmission consent scheme from "must-

carry or must-pay" to "must-carry and must-pay," a result far afield from what Congress intended in amending Section 325.

A must-carry/must-pay regime would also have adverse effects not only on cable systems, but also on subscribers. It would inevitably result in higher rates for subscribers. Those unwilling or unable to pay higher rates will cancel their cable subscriptions. Those who want both the increased diversity and increased local programming cable systems provide and the programming of an uncarried consent station will be required to install A/B switches and perhaps outdoor antennas.

Adherence to the Senate Report language would in any event produce irrational results. That language does not prohibit all changes to the exclusivity rules, but only those that "would allow distant stations to be substituted on cable systems for carriage of local stations carrying the same programming . . . ." Senate Report at 38. Under that language, elimination of network non-duplication rules would probably be prohibited because otherwise the result could very well be substitution of a distant network station for a local affiliate. However, elimination of syndex would not result in such substitution because syndex applies to individual programs that are not likely to be carried on a single, easily substitutable distant signal, and cable systems are not likely to substitute a distant signal for a local uncarried consent station in order to receive only a limited